

**CASE ANNOUNCEMENTS
COLORADO SUPREME COURT
MONDAY, JUNE 18, 2018**

"Slip opinions" are the opinions delivered by the Supreme Court Justices and are subject to modification, rehearing, withdrawal, or clerical corrections. Modifications to previously posted opinions will be linked to the case number in the petition for rehearing section the day the changes are announced.

Click on the case number to view the opinion in pdf format.

OPINIONS

2018 CO 56

Supreme Court Case No. 16SC365
Certiorari to Colorado Court of Appeals
Court of Appeals Court Case Nos. 15CA190 & 15CA331

Petitioner:

United States Welding, Inc., a Colorado corporation,

v.

Respondents:

Advanced Circuits, Inc., a Colorado corporation; and Buckeye Welding Supply
Company, Inc., a Colorado corporation.

Judgment Reversed
en banc

JUSTICE COATS delivered the Opinion of the Court.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

2018 CO 57

Supreme Court Case No. 15SC701
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 13CA2283

Petitioners:

Crea J. McMullin and Martha E. McMullin,

v.

Respondents:

John Hauer and Sena Hauer, individually and on behalf of the homeowners association of Two Rivers Estates; Lincoln Trust FBO John Hauer; Joseph Conrado; and Kelly Conrado.

Judgment Reversed
en banc

JUSTICE MÁRQUEZ delivered the Opinion of the Court.
JUSTICE GABRIEL does not participate.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

2018 CO 58

Supreme Court Case No. 17SC55
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 15CA1824

Petitioners:

Jay A. Roberts and Ashley Roberts McNamara, as Cotrustees of the Della I. Roberts Trust,

v.

Respondent:

Barry L. Bruce.

Judgment Affirmed
en banc

JUSTICE BOATRIGHT delivered the Opinion of the Court.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

2018 CO 59

Supreme Court Case No. 16SC894

Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 15CA1371

Petitioners:

The City of Boulder, Colorado; the City Council for the City of Boulder, Colorado; Suzanne Jones, in her official capacity as Mayor; Aaron Brockett, in his official capacity as Mayor Pro Tem; and Cindy Carlisle, Jill Alder Grano, Lisa Morzel, Mirabai Kuk Nagle, Bob Yates, Sam Weaver, and Mary Young, in their official capacities as members of the City Council,

v.

Respondent:

Public Service Company of Colorado, a Colorado corporation.

Judgment Reversed
en banc

JUSTICE GABRIEL delivered the Opinion of the Court.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

2018 CO 60

Supreme Court Case No. 18SA26

Original Proceeding Pursuant to C.A.R. 21

Adams County District Court Case No. 08CR3237

Honorable Robert Walter Kiesnowski, Jr., Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

James Robert Stackhouse.

Rule Made Absolute

en banc

JUSTICE HART delivered the Opinion of the Court.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

RULE CHANGES

RULE CHANGE 2018(08)

Uniform Local Rules for All State Water Court Divisions
Rules 11, 12 and 13.

Amended and Adopted by the Court, En Banc, May 31, 2018, effective immediately.

GRANTED PETITIONS FOR WRIT OF CERTIORARI

18SC195, Court of Appeals Case No. 16CA1864

Petitioners:

Colorado Cab Company LLC and Shamrock Charters Inc.,
v.

Respondent:

Daniel Brunson.

Petition for Writ of Certiorari GRANTED. EN BANC.

Whether the court of appeals erred as a matter of law when it reversed the decision of the district court and held, as an issue of first impression, that the overtime exemption for “interstate drivers, driver helpers, loaders or mechanics of motor carriers” under the Colorado Minimum Wage Order (7 Colo. Code Regs. 1103-1:5) applies only to drivers who physically drive across state lines.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

DENIED PETITIONS FOR WRIT OF CERTIORARI

No. 17SC420, Court of Appeals Case No. 14CA1388

Petitioner:

Gabriel Ian Orozco,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 17SC535, Court of Appeals Case No. 16CA471

Petitioner:

Gerome Ramero Brooks,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 17SC562, Court of Appeals Case No. 14CA1601

Petitioner:

Isidoro Alejandro Pena-Trevino,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 17SC730, Court of Appeals Case No. 13CA1873

Petitioner:

Francisco R. Quintana,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 17SC798, Court of Appeals Case No. 16CA404

Petitioner:

Dexter Harris,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 17SC850, Court of Appeals Case No. 13CA1114

Petitioner:

Fernando Leyva,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

JUSTICE MÁRQUEZ does not participate.

No. 17SC902, Court of Appeals Case No. 15CA1458

Petitioner:

Johnny Valdez,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 17SC903, Court of Appeals Case No. 15CA426

Petitioner:

James B. Aragon,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC50, Court of Appeals Case No. 14CA1841

Petitioner:

Lucas M. Watts,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC55, Court of Appeals Case No. 15CA1362

Petitioner:

Johnathan Thomas Ratcliff,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC58, Court of Appeals Case No. 16CA438

Petitioner:

Damian Brandon Johnston,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC59, Court of Appeals Case No. 15CA1500

Petitioner:

Ryan Darnell Cunningham,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC60, Pueblo County District Court Case No. 17CV30432

Petitioner:

Brigido Patrick Vargas,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC62, Court of Appeals Case No. 16CA829

Petitioner:

Michael Todd Ricks,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC63, Court of Appeals Case No. 16CA1802

Petitioner:

Tyler Groce,

v.

Respondent:

The People of the State of Colorado.

Petition For Writ of Certiorari DENIED. EN BANC.

No. 18SC72, Court of Appeals Case No. 15CA1978

Petitioner:

Ian Michael Ranney,

v.

Respondent:

The People of the State of Colorado.

Petition For Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC74, Court of Appeals Case No. 15CA1518

Petitioner:

Dean Porter Watson,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC75, Court of Appeals Case No. 16CA1261

Petitioner:

Dashawn Hardie Lipscomb,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC76, Weld County District Court No. 17CV30417

Petitioner:

James Nelson,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC77, Jefferson County District Court No. 17CV30447

Petitioner:

Michael Briels,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC79, Court of Appeals Case No. 15CA1358

Respondent:

The People of the State of Colorado,

In the Interest of Minor Child:

Petitioner:

I. A. M.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC81, Court of Appeals Case No. 16CA1254

Petitioner:

Tim Wind,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC82, Court of Appeals Case No. 16CA42

Petitioner:

Taria Jantail Wilhite,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC83, Court of Appeals Case No. 15CA1792

Petitioner:

Jared James Delles,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC85, Court of Appeals Case No. 16CA1626

Petitioner:

Jorge Jovani Rosales,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC88, District Court, City and County of Denver Case No. 16CV33682

Petitioner:

Rickey Dixon,

v.

Respondent:

The City and County of Denver.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC89, Jefferson County District Court Case No. 17CV338

Petitioner:

Sarah Arguello,

v.

Respondent:

Allison Village.

Petition for Writ of Certiorari DENIED. EN BANC.

JUSTICE BOATRIGHT does not participate.

No. 18SC90, Court of Appeals Case No. 16CA40

Petitioner:

Caleb Bowers,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC91, Court of Appeals Case No. 16CA560

Petitioner:

Daniel Reyes,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC93, District Court, City and County of Denver No. 15CV34396

Petitioner:

Kevin Watts,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC95, Court of Appeals Case No. 15CA1969

Petitioner:

Christopher Douglas Wise,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC96, Court of Appeals Case No. 14CA474

Petitioner:

Kevin Blair Roderick,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC100, Court of Appeals Case No. 15CA1398

Petitioner:

Michael Alvin Breaux,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC103, Court of Appeals Case No. 16CA797

Petitioner:

Johnny C. Gilbert,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC110, Mesa County District Court, 17CV30218

Petitioner:

Caleb Dell,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC112, Court of Appeals Case No. 16CA1182

Petitioner:

Dante Walker,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC120, Court of Appeals Case No. 17CA208

Petitioner:

Timothy Gardner,

v.

Respondent:

Rainbows, Inc.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC133, Court of Appeals Case No. 16CA1185

Petitioner:

Kaminski Kuatrel Lee,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC137, Court of Appeals Case No. 15CA1035

Petitioner:

Charles Lee Broce,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC149, Court of Appeals Case No. 16CA2255

Petitioner:

Federico Lerma,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

COLORADO SUPREME COURT CASE ANNOUNCEMENTS

No. 18SC154, Court of Appeals Case No. 13CA826

Petitioner:

Carol Lee Hawley,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC155, Court of Appeals Case No. 15CA866

Petitioner:

Leopoldo J. Maes,

v.

Respondent:

The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC215, Court of Appeals Case No. 17CA153

Petitioners:

Forensic Applications Consulting Technologies, Inc.; and Caoimhin P. Connell,

v.

Respondents:

Colorado Department of Public Health and the Environment; and Hazardous Materials and Waste Management Division.

Petition for Writ of Certiorari DENIED. EN BANC.

No. 18SC363, Court of Appeals Case No. 17CA1075

Petitioner:

S. C.,

v.

Respondent:

The People of the State of Colorado,

In the Interest of Minor Children:

A. K. C. and D. L. C.

Petition for Writ of Certiorari DENIED. EN BANC.

JUSTICE MÁRQUEZ does not participate.

13CA1873 Peo v Quintana 08-03-2017

COLORADO COURT OF APPEALS

Court of Appeals No. 13CA1873
Conejos County District Court No. 11CR51
Honorable Michael A. Gonzales, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Francisco R. Quintana,

Defendant-Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FOX
Dailey and Bernard, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced August 3, 2017

Cynthia H. Coffman, Attorney General, Joseph G. Michaels, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Elizabeth Griffin, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Francisco R. Quintana appeals the judgment of conviction entered on jury verdicts finding him guilty of first degree assault, crime of violence enhancers, menacing, and misdemeanor use of a controlled substance. We affirm and remand for the trial court to correct the mittimus.

I. Background

¶ 2 In the early morning hours of August 7, 2011, Zachary Rodriguez and his girlfriend, Lena Atencio, left a party and went to Francisco Quintana’s home to purchase cocaine. What transpired during and immediately after the drug deal was disputed at trial. However, it is undisputed that, at some point during the deal, Rodriguez and Quintana argued about the quantity or quality of the drugs and whether Quintana unjustly refused to refund Atencio’s money. It is also undisputed that Rodriguez challenged Quintana to “fight for the money.”

¶ 3 After Rodriguez threatened to “beat [Quintana’s] ass,” then seventeen-year-old Quintana responded, “Oh, yeah?,” and ran upstairs where he obtained a .22 caliber rifle and, from the top of the stairs, pointed it toward Rodriguez and Atencio. The parties exchanged more words and Quintana fired a shot to the right of

Rodriguez. Rodriguez charged up the stairs, and Quintana fired a second shot, striking Rodriguez in the chest and ending the altercation.

¶ 4 Quintana called 911 and police and an ambulance arrived. Rodriguez was transported to a hospital in Colorado Springs. He later recovered from his wound.

¶ 5 Quintana was charged with attempted second degree murder, first degree assault, two crime of violence sentence enhancers (serious bodily injury and deadly weapon) for each of the attempted murder and assault charges, felony menacing, and misdemeanor use of a controlled substance. The jury acquitted Quintana of the attempted second degree murder charge and found Quintana guilty of the remaining counts. The trial court sentenced Quintana to serve twelve years in Department of Corrections (DOC) custody, suspended on the condition Quintana complete six years in the Youthful Offender System.

II. Self-Defense

¶ 6 Quintana argues that the evidence at trial was insufficient to support the jury's conclusion that Quintana did not act in self-defense when he shot Rodriguez.

A. Preservation and Standard of Review

¶ 7 The parties dispute whether Quintana properly preserved his sufficiency of the evidence claim for review on appeal. Regardless, “we review the record de novo to determine whether the evidence before the jury was sufficient . . . to sustain the convictions.”

Dempsey v. People, 117 P.3d 800, 807 (Colo. 2005); *People in Interest of T.B.*, 2016 COA 151M, ¶ 19.

In doing so, we consider whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, was substantial and sufficient to support a conclusion by a reasonable mind that the defendant was guilty of the charge beyond a reasonable doubt.

T.B., ¶ 19. We must give the prosecution the benefit of every inference that may fairly be drawn from the evidence presented at trial. *People v. McCoy*, 2015 COA 76M, ¶ 37 (cert. granted Oct. 3, 2016).

¶ 8 Because we conclude that sufficient evidence existed to support Quintana’s conviction, including the prosecution’s theory against Quintana’s claim of self-defense, we need not address whether the appropriate reversal standard requires inquiry into whether any error was plain. *See, e.g.*, *id.* at ¶¶ 29-32.

B. Law and Analysis

¶ 9 In Colorado a person is generally

justified in using physical force upon another person in order to defend himself . . . from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

§ 18-1-704(1), C.R.S. 2016. As relevant here, “[d]eadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and . . . [t]he actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury.”

§ 18-1-704(2). When self-defense is raised as an affirmative defense, the prosecution bears the burden of disproving a defendant’s self-defense theory beyond a reasonable doubt. *See Montoya v. People*, 2017 CO 40, ¶¶ 25-27.

The following testimony was presented at trial:

- Quintana let Rodriguez and Atencio into the residence;
- Quintana attempted to “burn” Atencio by selling an inadequate quantity of cocaine and then refusing to refund Atencio’s money;

- Rodriguez was unarmed and never touched Quintana;
- Quintana was allegedly “high out of his mind” during the altercation;
- Quintana never asked Rodriguez or Atencio to leave; and
- Rodriguez did not advance up the stairs toward Quintana until after the first shot was fired, at which point Rodriguez believed he needed to get the gun from Quintana to avoid being shot.

¶ 10 This evidence, when viewed in the light most favorable to the prosecution, *see T.B.*, ¶ 19, contradicted Quintana’s theory that he reasonably believed that his use of force was necessary to defend against an imminent threat. *See* § 18-1-704(2).

¶ 11 Quintana’s argument effectively asks us to view the situation in a vacuum, looking only to the moments immediately before the shooting occurred; however, we review the entire transaction. *See T.B.*, ¶ 19. The record reflects instead that Quintana escalated the situation by allegedly refusing to refund money or provide adequate drugs as well as retrieving and introducing the gun. *See, e.g., Bush v. People*, 10 Colo. 566, 574, 16 P. 290, 294 (1888) (right to self-defense may be impaired by one’s own wrongful act); *People v. Bachofer*, 192 P.3d 454, 464 (Colo. App. 2008) (force used in self-

defense must be reasonable under the circumstances); *accord Commonwealth v. Blackman*, 285 A.2d 521, 523 (Pa. 1971) (because appellant brought gun into conflict before victim had shown knife, he could not establish valid self-defense claim); *Commonwealth v. Johnston*, 263 A.2d 376, 379 (Pa. 1970) (self-defense disproved if a defendant continues the difficulty).

¶ 12 Although conflicting accounts of the episode were presented at trial, the jury ultimately determined witness credibility and the veracity of their testimony. *Montoya*, ¶ 19. The jury's verdict, convicting him of second degree assault and necessarily rejecting Quintana's self-defense theory, is supported by substantial and sufficient evidence in the record, and we will not disturb it. *See T.B.*, ¶ 19.¹

¹ Because we conclude that the evidence at trial was sufficient to support the jury's rejection of Quintana's self-defense theory on reasonableness grounds, we need not address the prosecution's arguments that the evidence supported a conclusion that Quintana provoked Rodriguez and that Quintana retreated to a place of safety before firing the gun.

III. Evidence of Rodriguez's Prior Bad Acts

¶ 13 Quintana next argues that the trial court erred in refusing to allow testimony concerning Rodriguez's prior bad acts. We disagree.

A. Preservation and Standard of Review

¶ 14 The parties agree that Quintana preserved his argument that the evidence of Rodriguez's prior bad acts involving Rodriguez's mother was admissible res gestae evidence. The parties also agree that the proffered hearsay concerning Rodriguez's altercation with a neighbor was properly preserved. But, the prosecution argues that Quintana failed to properly preserve his arguments (1) that the evidence about the incident with Rodriguez's mother was admissible pursuant to CRE 404(b) and (2) that the trial court's refusal to allow the evidence deprived Quintana of his constitutional right to present a defense.

¶ 15 We review challenges to the admission of evidence for an abuse of discretion. *Nicholls v. People*, 2017 CO 71, ¶ 15; *People v. Salas*, 2017 COA 63, ¶ 30. "A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues the law." *Salas*, ¶ 30.

¶ 16 A trial court's error in an evidentiary ruling, properly preserved for appeal, is generally subjected to the non-constitutional harmless error standard of reversal. *See Nicholls*, ¶ 17 (reviewing hearsay and other evidentiary claims of error for non-constitutional harmless error, but noting that alleged violations of the Confrontation Clause are reviewed under the constitutional harmless error standard). "If a reviewing court can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial, the error may properly be deemed harmless." *Id.* (quoting *People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989)).

B. Additional Facts

¶ 17 At trial, Quintana attempted to elicit evidence that (1) Rodriguez encountered police officers in July 2011 *after* alleged threats of assault by Rodriguez at the home of one of Quintana's neighbors; and (2) Rodriguez's mother reported that, earlier on the day of the drug deal with Quintana, Rodriguez came to her home and, when she refused to give him money, Rodriguez dragged her off a bed and took money from her.

¶ 18 As to the July incident with Quintana’s neighbors, the trial court ruled that the evidence was inadmissible hearsay because Quintana had no first-hand knowledge of the altercation and only learned of it through his neighbor. And, as to the incident with Rodriguez’s mother, the trial court ruled that the evidence was irrelevant because Quintana was not then aware of Rodriguez’s alleged acts; therefore the evidence could have no bearing on Quintana’s self-defense claim — which involved Quintana’s subjective fear.²

C. Law and Analysis

1. Altercation with Neighbors

¶ 19 Hearsay is “a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” CRE 801(c). Because hearsay

² The trial court noted that, to the extent the prosecution opened the door, Quintana may have been allowed to elicit testimony about Rodriguez’s prior acts for impeachment purposes. However, ultimately, the trial court concluded that the door had not been opened and Quintana was not allowed to pursue this line of questioning. The trial court allowed Quintana to present evidence that Rodriguez had contact with police earlier the night of the shooting, but it did not allow Quintana to elicit details of, or the reasons for, the contact.

statements are presumptively unreliable, “[p]arties are generally prohibited from introducing hearsay statements into evidence.”

Nicholls, ¶ 15.

¶ 20 Quintana argues that the trial court erred in concluding that evidence regarding Rodriguez’s altercation with Quintana’s neighbors, known to Quintana because the neighbors told him, was inadmissible hearsay. Quintana argues that the evidence was not offered to prove the truth of the matter asserted — for instance, whether the incident took place — but was offered to support Quintana’s fear of Rodriguez and Quintana’s state of mind during the events that led to the shooting. Further, Quintana argues that the statements were relevant to proving Quintana’s state of mind, specifically his fear of Rodriguez.

¶ 21 We agree with Quintana that the statements were not offered for their truth and were relevant to Quintana’s subjective fear. However, we conclude that any error was harmless because the record reflects that Quintana presented ample evidence, through his own testimony and his brother’s testimony, of Rodriguez’s aggression and threats toward Quintana throughout the altercation that led to the shooting. *See id.* at ¶ 17. The record further

evidences that Quintana testified regarding his fear of Rodriguez, and we agree with the prosecution that evidence of Rodriguez's altercation with Quintana's neighbors was merely cumulative of this point.³ *See People v. Maps*, 231 P.3d 5, 11 (Colo. App. 2009) (stating that evidence merely corroborating other testimony is cumulative and any error in excluding such statements is harmless). Because the statements only corroborated evidence that was presented to the jury, we conclude that any error in refusing to admit statements regarding Rodriguez's contact with Quintana's neighbors was harmless. *See Nichols*, ¶ 17.

³ Quintana admits in his opening brief that he "reported and testified that Rodriguez was confrontational, demanded money, *repeatedly* threatened to harm or kill him, and wouldn't leave when asked." Therefore, the jury was adequately informed that Quintana feared Rodriguez. For the same reasons, we also reject Quintana's argument that exclusion of the statements regarding Rodriguez's contact with Quintana's neighbors violated Quintana's right to present a defense. Quintana testified at length regarding his fear of Rodriguez, and the jury was instructed on Quintana's self-defense theory. Thus, Quintana's right to present a defense was not hindered by the exclusion of cumulative evidence. *See People v. Carmichael*, 179 P.3d 47, 56 (Colo. App. 2007) (exclusion of cumulative evidence did not prejudice defendant's right to present a defense), *rev'd on other grounds*, 206 P.3d 800 (Colo. 2009).

2. Altercation with Rodriguez's Mother

¶ 22 To be admissible, evidence must be relevant. CRE 402.

“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” CRE 401.

¶ 23 Central to Quintana’s self-defense theory was Quintana’s subjective fear of an imminent threat from Rodriguez. *See* § 18-1-704(1). The record reflects that Quintana was not aware of the altercation between Rodriguez and his mother before the shooting; thus, evidence of that event had no tendency to make a fact of consequence any more or less probable. *See* CRE 401.

¶ 24 However, Quintana argues that evidence of Rodriguez’s encounter with his mother was otherwise relevant as res gestae evidence of the entire encounter. *See People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009) (Res gestae “recognizes that certain evidence is relevant because of its unique relationship to the charged crime.”). Quintana argues that evidence of the encounter was necessary to allow the jury to consider the totality of the circumstances in its evaluation of the reasonableness of his belief of

imminent danger. *See Riley v. People*, 266 P.3d 1089, 1094 (Colo. 2011) (stating that a jury may consider all relevant evidence in evaluating the totality of the circumstances surrounding a self-defense claim).

¶ 25 Assuming without deciding that the evidence was admissible as res gestae evidence, we conclude that any error in refusing to admit the evidence was harmless. The record evidences that the jury heard other testimony directly addressing Quintana's fear of Rodriguez and Rodriguez's alleged belligerent and threatening demeanor. In fact, Quintana testified regarding Rodriguez's aggressiveness and Quintana's fear throughout the episode. We conclude that evidence of Rodriguez's encounter with his mother, offered to show Rodriguez's aggressiveness and tendencies toward violence, would have been cumulative of other evidence presented to the jury, and thus any error in excluding such evidence was harmless. *See People v. Theus-Roberts*, 2015 COA 32, ¶ 31 (any error in admitting cumulative evidence is harmless).

¶ 26 Quintana further argues that the evidence was proper under CRE 404(b) and *People v. Jones*, 675 P.2d 9 (Colo. 1984), as probative of Rodriguez's motive, opportunity, intent, preparation,

plan, and lack of mistake. Even if evidence of the encounter with Rodriguez's mother was relevant, its exclusion was harmless, so we need not address its propriety under CRE 404(b). *See People v. Herdman*, 2012 COA 89, ¶ 52.

IV. Prosecutorial Misconduct

¶ 27 Quintana next contends that the prosecution misled the jury about self-defense and lowered its burden of proof. We disagree.

A. Preservation and Standard of Review

¶ 28 The parties agree that Quintana failed to properly preserve his prosecutorial misconduct arguments for appeal.

¶ 29 Our review of a claim of prosecutorial misconduct involves a two-step analysis. *People v. Howard-Walker*, 2017 COA 81, ¶ 81 (citing *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010)). We first determine whether the conduct at issue was improper based on the totality of the circumstances. *Id.* Next, we determine whether any misconduct warrants reversal. *Id.*

¶ 30 Because Quintana's arguments were not preserved for appeal, we will only reverse if any error in allowing improper argument amounts to plain error. *Id.* at ¶ 82.

B. Additional Facts

¶ 31 In rebuttal closing argument, the prosecution argued:

- The “concept of using deadly force in defense of one’s home is a good one. It’s good to keep yourself safe . . . in your home, absolutely.”
- Here, however, “there’s no burglary. There’s an invited guest, invited to do drugs, invited to do a drug deal.”
- “When evaluating a firearm and the use of a firearm, a lot of you were talking about how . . . it should be [a] last resort. Makes a lot of sense.”
- Quintana had — but did not take advantage of — options other than shooting Rodriguez, including using his Rottweiler to defend himself.

The prosecution also began its rebuttal closing by discussing the jury instructions and stating the instructions were “absolutely what you should follow. These are so important, this is what you follow. Nothing else.”

C. Analysis

¶ 32 Quintana argues that the prosecution’s statements during rebuttal closing misled the jury regarding self-defense by (1)

mischaracterizing “deadly force”; (2) arguing that use of a firearm should be a last resort option only utilized after retreat; and (3) suggesting that Quintana could use a firearm for protection only if Rodriguez was an intruder. We disagree.

¶ 33 The record shows that, when viewing the prosecution’s argument in its entirety, the prosecution’s statements during closing argument were permissible. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005) (closing argument allows advocates to utilize and explain pieces of evidence, and a prosecutor has wide latitude in the language and presentation style used to obtain justice). The prosecution’s argument focused primarily on inconsistencies in Quintana’s testimony and the reasonableness of Quintana’s actions throughout the events that led to the shooting.

¶ 34 The minimal references to Quintana’s “other options” and the use of “deadly force” as a last resort did not misconstrue the law or alter the prosecution’s burden. On the contrary, the jury was correctly instructed on the elements that the prosecution had to prove for each count, and the jury was properly instructed on Quintana’s self-defense theories for the attempted second degree murder and first degree assault charges. *See People v. Oram*, 217

P.3d 883, 896 (Colo. App. 2009) (absent some indication otherwise, we assume the jury followed the court's instructions), *aff'd*, 255 P.3d 1032 (Colo. 2011). The prosecution emphasized the importance of the court's instructions at the outset of its argument. The record reflects that the prosecution's arguments emphasized the reasonableness of Quintana's decision to obtain and use the gun and did not, as Quintana argues, shift or diminish the prosecution's burden. And, the lack of any objection to the alleged improper arguments indicates that defense counsel did not consider the "now-objected-to testimony" to be seriously prejudicial to Quintana. *Howard-Walker*, ¶ 117.

¶ 35 We conclude that Quintana's claims of prosecutorial misconduct fail to satisfy the first step of our analysis and were not improper in light of the totality of the circumstances. *Id.* at ¶ 81.

V. Cumulative Error

¶ 36 Quintana argues that the cumulative effect of the trial court's alleged erroneous exclusion of evidence of Rodriguez's prior acts and allowance of instances of prosecutorial misconduct constituted cumulative error, which rendered the trial unfair. To the extent that there were any errors in the proceedings, we conclude that

Quintana was not deprived of a fair trial, and we reject his argument of cumulative error. *See People v. Mendenhall*, 2015 COA 107M, ¶ 82 (“Reversal is not required for cumulative error unless the cumulative effect of the errors shows that a defendant’s right to a fair trial was substantially prejudiced.”).

VI. Mittimus

¶ 37 The parties contend, and we agree, that the trial court erroneously entered judgments of guilt on two of the four crime of violence enhancers because those two were related to the attempted second degree murder charge for which Quintana was acquitted. We therefore remand this matter to the trial court to correct the mittimus accordingly.

VII. Conclusion

¶ 38 The judgment is affirmed and the case is remanded for the trial court to correct the mittimus with respect to the two crime of violence enhancers attributable to the attempted second degree murder count for which Quintana was acquitted.

JUDGE DAILEY and JUDGE BERNARD concur.